

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF INTERGRATED)	
RESOURCE PLANNING FOR THE)	
PROVISION OF STANDARD OFFER)	
SUPPLY SERVICE BY THE DELMARVA)	
POWER AND LIGHT COMPANY UNDER 26)	
DEL. C. SECTION 1007 (c) & (d):)	PSC DOCKET NO. 06-241
REVIEWING AND APPROVAL OF THE)	
REQUEST FOR PROPOSALS FOR THE)	
CONSTRUCTION OF NEW GENERATION)	
RESOURCES UNDER 26 DEL. C. SECTION)	
1007 (d) (OPENED JULY 25, 2006))	

COMBINED COMMENTS OF THE DIVISION OF THE PUBLIC ADOVCATE
CONCERNING THE TRANSPARENCY OF THE SUPPLIERSøBID PROPOSALS (PART
I) AND THE FOUR STATE AGENCY BID EVALUATIONS (PART II)
FEBRUARY 22, 2007

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PART I

A. Introduction

Pursuant to the Rules of Practice and Procedure of the Public Service Commission of Delaware (the Commission), the Division of the Public Advocate (the DPA) hereby submits these comments concerning Delmarva Power and Light Company's (Delmarva or DP&L) request for proposals (RFP), pursuant to the Electric Utility Retail Customer Supply Act of 2006 (EURCSA), codified at 26 Del. C. § 1007

B. Background

EURCSA directs Delmarva to file a proposal to obtain long-term supply contracts on or before August 1, 2006. As a part of that filing, DP&L must include a proposed form of Request for Proposals (RFP) for the construction of new generation resources within Delaware for the purpose of serving customers taking standard offer service

The EURCSA directed DP&L to file a proposal to obtain long-term contracts on or before August 1, 2006, to immediately attempt to stabilize the long-term outlook for [SOS]¹ in DP&L's service territory. The General Assembly required the application to contain a proposed form of RFP for construction of new generation resources within Delaware to serve SOS customers.

The General Assembly required the RFP to include a proposed form of output contract which, at a minimum, would include capacity and energy and could also include ancillary electric products and environmental attributes between DP&L and the providers of the new generation. The General Assembly specified the term of such contracts to be between 10-25 years.

In addition, DP&L was directed to include selection criteria based on the cost-effectiveness of the project in producing energy price stability, reductions in environmental impact, benefits of adopting new and emerging technology, siting feasibility, and terms and conditions concerning the sale of energy output from such facilities.² The General Assembly ordered DP&L to issue its RFP on November 1, 2006, and set December 22, 2006 as the

¹ 26 Del. C. § 1007(d).

² *Id.*

deadline for receipt of bids.³ Three bidders filed proposals in response to the RFP, in redacted form, requesting confidential treatment of several portions of their bids, including price.

The General Assembly further ordered the State Agencies to evaluate the proposals received on or before February 27, 2006, authorizing them to “determine to approve one or more of such proposals that result in the greatest long-term system benefits in the most cost-effective manner.”⁴ Once the State Agencies identify such proposal(s), DP&L is required to enter into contracts with the selected bidders.⁵

On January 29, 2007, Dr. Jeremy Firestone, a participant in this proceeding filed a motion requesting that the Commission “Commence Proceedings to Determine Validity of Assertions of Confidentiality,”⁶

The Commission did not act on Mr. Firestone’s motion. Instead the Commission determined *sua sponte* to investigate the validity of the claims of confidentiality by the bidders.⁷ During these deliberations, the Commission determined that prior to opening a formal proceeding to investigate this matter the bidders should file revised redacted bids for public inspection, by February 15, 2007.⁸ Subsequent to that, and if participants see the need, they could file comments no later than February 22, 2007 to further challenge the redactions.

C. DISCUSSION

The DPA finds the circumstances surrounding the issue of confidentiality of the bid proposals strikingly similar to that of PSC Docket No. 04-391 in which the Commission considered and ultimately approved the parameters of Standard Offer Service, (“SOS”) for electric supply.

In that proceeding, the Commission determined that SOS in Delaware would be provided pursuant to a “wholesale” model, whereby the Commission would select the incumbent distribution utility (DP&L) as the SOS provider, who would secure the power to

³ *Id.* at § 1007(d) (1).

⁴ *Id.* at § 1007(d) (3).

⁵ *Id.*

⁶ Motion of Jeremy Firestone, Esq. to Commence Proceedings to Determine Validity of Assertions of Confidentiality at (insert page number). PSC Docket 06-241, January 2007.

⁷ Transcripts at p. 842, lines 8-24, PSC Commission Meeting, February 6, 2007.

⁸ *Id.* at 841, lines 16-23.

serve SOS customers from the wholesale power market by utilizing a competitive RFP process to procure the full requirements of customers eligible for a fixed price SOS.⁹

The Commission, found the proposed settlement and its terms to be in the public interest.¹⁰ With the settlement, the Commission ordered a conditional level of transparency with respect to bids, bidders, price, and other material issues. For example, the Commission set forth certain terms and conditions under which information claimed to be confidential were subject to carefully articulated restrictions.¹¹

The prevailing consensus among the parties during the SOS proceeding was that the public interest may be served better with the level of confidentiality discussed above. The alternative of full transparency for any and all information all of the time may have the adverse ramification of attracting no bidders. That appears to be more of a disservice to the public interest. No bidders would have resulted in spot market purchases of power for SOS customers, effectively undermining the design of the bidding process to secure "stable pricing" for consumers.¹²

Subsequent to being selected a "winning bidder," suppliers needed a period of time to procure supply to meet the bid requirements. Thus, a "winning bidder" could be substantially out leveraged when negotiating for supply by an up market supplier, especially with regards to pricing. The effective compromise reached in the SOS process was that bidders were given time to procure such supply, **before** confidential information is released.

This conditional level of confidentiality was further upheld by the Commission during a subsequent re-examination of the process conducted last year. In fact, the

⁹ PSC Order No. 6746, October, 2005.

¹⁰ Ibid, Ordering Paragraph 1, ¶1. That the Findings and Recommendations of the Hearing Examiner dated September 1, 2005 (attached to the original hereof as Exhibit "A") recommending that the parties' Settlement Agreement be approved are hereby approved and adopted in their entirety. The September 28 amendment to the Settlement Agreement is also approved (attached to the original hereof as Exhibit "B"). Hearing Examiner Report, Para. 59(A), "That the Commission find the attached Proposed Settlement ("Attachment A") to be in the public interest and in compliance with state law"

¹¹ See, Settlement Agreement at Section I, Reports and Information Regarding Bidding and Bid Results, ¶¶ 1-8, PSC Order No. 6746, PSC Docket No. 04-391, [October 21, 2005].

¹² ¶1. To provide rate stability for residential and small commercial customers, Delmarva will initially procure " " PSC Order 6746, October 21, 2005

Commission slightly relaxed the restrictions on the timing of the release of the information from 30 calendar days to 21 days.¹³

The Commission again determined that some level of confidentiality better served the public interest than a level of transparency without restriction by adopting the recommendation of the Hearing Examiner.¹⁴

This proceeding has further complexities than the SOS bidding docket. This proceeding, pursuant to EURCSA, has additional elements for weighting, to determine a winning bid. In Docket No. 04-391, the bid that translated into the lowest retail rates, across all customer classes was deemed to be the winning bid.

Albeit too heavily on price, the bids now are weighted by other factors, including environmental impact and siting. Furthermore, comments made by the Commission as well as DNREC, with regard to price disclosure of the bids, further complicate the matter.¹⁵

D. RECOMMENDATION

Thus, the DPA believes that to best serve the public interest, the Commission should favorably consider making a finding of fact to determine whether the claims of confidentiality raised by the bidders are just and reasonable, and what, if any, conditions should be placed on the level of transparency. Furthermore, the Commission should not make a ruling that undermines the SOS bidding process, now in place pursuant to PSC Docket 04-391. This process, along with its defined level of transparency, continues to serve the public interest by effectuating a competitive bidding process that provides rate stability to customers, and a balanced risk allocation.

¹³ "The Commission's Discussion and Findings. While we understand and appreciate Constellation's contentions, we are not persuaded that the competitive disadvantage that it cites really does exist after 21 calendar days (which we note is nearly a month's time)." P. 59, PSC Order 7053, November 21, 2006.

¹⁴ "Staff proposes that specific information regarding the winning bids be released after three weeks because (a) it was clear after the initial procurement that the legislators and the public wished to have this information and (b) Staff does not find the arguments regarding the potential harm to the competitive process to be persuasive.", PSC Docket 04-391, Report of the Hearing Examiner, September 15, 2006.

¹⁵ Transcripts pp. 925, lines 9-24; 830, lines 12-24, PSC Commission Meeting, February 6, 2007.

PART II

A. Background and Discussion

The Electric Utility Restructuring Act of 1999 (the "Act") required Delmarva Power & Light Company ("Delmarva" or "the Company") to file a restructuring plan under which it would provide standard offer service ("SOS") for an initial transition period ending on September 30, 2002 for non-residential customers and on September 30, 2003 for residential customers. The restructuring plan and related matters relevant to customer choice and restructuring were approved in a series of Orders issued in Docket No. 99-163. Among other things, the approved restructuring plan reduced rates for residential customers and froze those reduced residential rates and the applicable rates for non-residential customers until the end of the respective transition periods.

Prior to the end of the initial transition periods, a merger involving Delmarva and Potomac Electric Power Company was proposed. In the resolution of that docket, the Delaware Public Service Commission (the "Commission") approved a settlement that authorized the proposed merger on the condition that Delmarva's obligation to provide SOS would continue until May 1, 2006 at rates that were reset to reflect market prices at that time. (Docket No. 01-194).

In PSC Order No. 6746 (Oct. 11, 2005), the Commission established a Request for Proposal ("RFP") procurement process under which Delmarva Power & Light Company ("Delmarva Power") acquires the wholesale electric supply necessary for it to provide retail electric service to its Standard Offer Supply ("SOS") customers in Delaware. In December of 2005 and January of 2006, Delmarva Power utilized the approved RFP process to procure supply for its post-May 2006 fixed-price SOS services. Many of the contracts awarded as part of that process expire on June 1, 2007 and, therefore, in December of last year Delmarva Power conducted another RFP bid process to procure a portion of supply for its post-May 2007 SOS load.

On April 6, 2006, the Delaware General Assembly enacted the Electric Utility Retail Customer Supply Act of 2006 (the "Retail Supply Act" or "Act"). The Retail Supply Act was passed in response to the substantial increase in electric rates that Delaware SOS customers

would experience after price caps were removed and market based rates became effective. The Act made clear that electric distribution companies would be subject to Commission oversight: it required Delmarva (among others) to engage in integrated resource planning and to submit an Integrated Resource Plan to the Commission every other year; to engage in competitive bidding to satisfy its obligation to provide SOS to its Delaware customers; to require Delmarva to develop and implement demand-side management programs designed to reduce overall consumption and reduce usage during peak periods; and to explore advanced metering technologies.

EURSCA is a result of a Task Force Report on Energy and Executive Order #82, compiled by multiple state agencies, in response to the 59%-120% increase in SOS rates, announced in February of 2006.¹⁶

Executive Order # 82, asked the Commission to:

examine the feasibility of ; (b) requiring Delmarva to build generation, or enter into long term supply contracts, to meet up to 100 percent of supply options *under traditional rate base, rate of return regulation*; (Id.) (emphasis added)

The Governor recognized the challenges and possible impediments of this option, which the Task Force later confirmed. The report subsequently concluded:

We believe it would be unwise to mandate a return to utility procurement under traditional rate making without clear procurement conduct guidance to the utility. We believe that any such mandate **should be required to follow** modern Integrated Resource Planning (IRP) guidelines, and take place under PSC oversight. This stands in contrast to the incremental procurement process that is generally seen under traditional ratemaking regimes. A mandate to Delmarva Power for building or buying new generation resources should be considered *only as part of IRP practices*.¹⁷

¹⁶ WHEREAS, the lifting of rate caps for Delmarva customers on May 1, 2006 could lead to a rate increase of greater than 50 percent for residential customers; increase electric rates for small and mid-sized commercial customers by up to 67 percent; and increase electric rates for large commercial and industrial customers by as much as 118 percent that do not choose alternative suppliers; and WHEREAS, the regional wholesale electric supply market prices are at historic highs, experiencing substantial volatility and appear to be adversely affected by natural gas price fluctuations, lack of sufficient regional fuel diversity, significant weather events, and world political situations; and *Executive Order Number Eighty-Two Implementing Strategies To Address Energy Restructuring*, February 6, 2006.

¹⁷ Ensuring Delaware's Energy Future, A Response to Executive Order 82, March 8, 2006.

Furthermore, under traditional rate base, rate of return regulation, the utility (Delmarva) owned generation facilities and hedged its sales and ancillary power purchases. EURCSA does not create a traditional rate base rate of return construct. Currently, the utility is not vertically integrated to include generation, nor does it hedge energy purchases, rather, any and all risk is borne by the customers of SOS service.¹⁸ For example, if the Commission were to require Delmarva, as the SOS supplier, to enter into a long-term contract, above market rates at anytime, customers would either be restricted from choosing a lower-cost supplier, or pay a surcharge offsetting much of their savings. This undermines competition by either shielding customers from market savings or capping competitive suppliers' revenues.

More importantly, it is not traditional rate base rate of return regulation for electricity because under traditional rate making, ratepayers are charged based on the actual cost for all resources. This is not the case in market-based rate procurement such as that which is being proposed here in Docket 06-241. The prices in power purchase agreements like the ones proposed here are based on market clearing prices. These market clearing prices are derived from an imperfect wholesale market.

The DPA is not suggesting a return to rate base rate of return regulation, we are merely pointing out the fact that EURCSA is not traditional regulation, thus, customers will not be afforded the same historical protections.

B. The Bid Evaluations

The DPA makes the following recommendations, notwithstanding its ongoing objections to the terms of the RFP. The DPA reasserts its opposition to the volume of the load, 400MW. The volume of the load represents an amount which, at most intervals, will be greater than the SOS baseload and will result in the utility having to sell excess supply into a

¹⁸After hearing and a determination that it is in the public interest, the Commission is authorized to restrict retail competition and/or add a nonbypassable charge to protect the customers of the electric distribution company receiving standard offer service. The General Assembly recognizes that electric distribution companies are now required to provide standard offer service to many customers who may not have the opportunity to choose their own electric supplier. Consequently, it is necessary to protect these customers from substantial migration away from standard offer service, whereupon they may be forced to share too great a share of the cost of the fixed assets that are necessary to serve them as required by the Electric Utility Retail Customer Supply Act of 2006, 75 Del. Laws, c. 242. 26 Del. § 1010(c)

real-time wholesale market potentially at a loss that will be absorbed by consumers.¹⁹ In addition, this number does not reflect any demand-side management initiatives. Several of these programs, if implemented under PSC Docket No. 07-20, will shave base load as well as peak-load.

The DPA continues with its stated position that the environmental factors were not weighted heavily enough. This omission creates the potential of undermining previously enacted and ongoing energy efficiency and fuel diversity programs, such as, the Renewable Portfolio Standards and the Delaware Energy Act.²⁰

The execution of a long-term power purchase agreement (of 20 or 25 years) that is contained in the bid proposals must be supported with empirical evidence, not just the theoretical concept that a long-term agreement is necessarily a guarantee of lower costs.

1. The Four State Agency Review²¹

The DPA is concerned about the potential effect on the Commission's exclusive ratemaking authority²² by the participation of other state agencies in reviewing, evaluating, and determining the award of contracts for electric supply.

2. SOS bidding pursuant to PSC Order # 6746 in Docket 04-391

EURCSA should not make customers worse-off than they are now under the current SOS bidding process. This process has been found to be competitive and in the public interest by this Commission,²³ Thus, the Four State Agencies must do more than merely compare the three respective bids.

The Four State Agencies must consider each bid against the existing SOS process in regard to rate stability and consumer protections. The contract awarded in this proceeding must be manifestly better than the current SOS procurement strategy. In that regard, and consistent with sound public policy, the execution of any of these power purchase agreements must leave most customers better off without leaving any customers worse-off.

¹⁹ ICR, p. 13, PSC Docket 06-241

²⁰ Initial Comments of the DPA, PSC Docket 06-241, filed August 28, 2006.

²¹ 26 Del 10 § 1007 (d) (3)

²² 26 Del. 1 § 201 (a)

²³ PSC Docket 04-391, Order 6746.

3. Wind Power

In their evaluations, the Four State Agencies would be doing wind power a disservice if it is viewed strictly as a capacity resource. Wind power must be viewed as an energy resource that is a hedge against future fossil fuel cost spikes as well as having adverse air emissions.

Wind power is no longer a novelty. In fact, PJM's day-ahead and hour-ahead markets provide a means for dealing with the variability of the output of a wind plant.

If the Commission does elect a wind provider, the Commission must pursue changes at PJM in order to better accommodate the wind generation. For example, transmission tariffs must include an "as-used" payment option, rather than the current capacity reservation option.

4. The Mid-Atlantic Power Pathway, ("MAPP"²⁴)

The DPA is not opposed to the Four State Agency review pursuing environmentally friendly generation options, such as those anticipated by EURCSA, even if it were to come at a premium price. The DPA would request a proceeding to develop a low-income rate in this case, so that low-income families will have access to the environmentally friendly generation without facing undue hardship.

The Four State Agency review must include an investigation into the possibility that Delaware customers may be paying for environmentally friendly generation, but not experiencing the benefits. The Four State Agencies need to ensure that Delaware's load would force the dispatch of the environmentally friendly energy first, even if it is out of merit order, especially at the level of capacity the RFP is calling for. (400MW)

The four state agency reviews must determine if Delaware has a generation issue or a transmission issue. The Independent Consultant Report, (the "ICR"), states implicitly that Delaware has a "lack of generation problem" because the load is greater than the available generation capacity in the state.²⁵ This assertion is misleading.

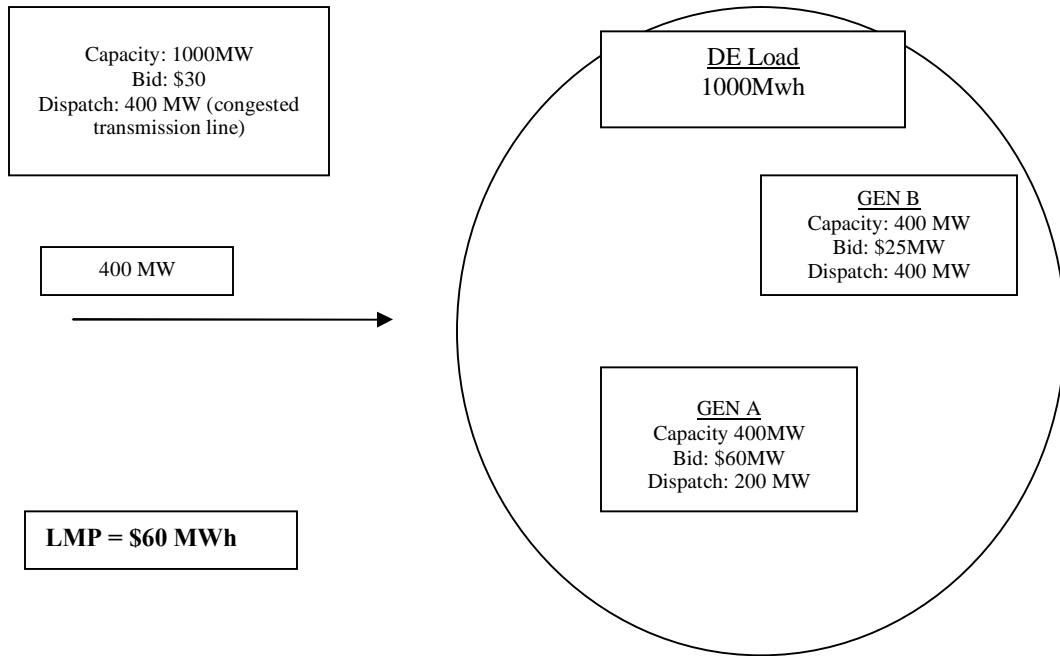
²⁴ PJM Regional Transmission Planning, 2012 initiative, DPA's Initial Comments, PSC Docket 06-241, filed August 28, 2006.

²⁵ PSC Docket 06-241, Final Report Regarding Delmarva Power & Light Company's Proposed RFP, Adopted by the PSC Staff and Delaware Energy Office.

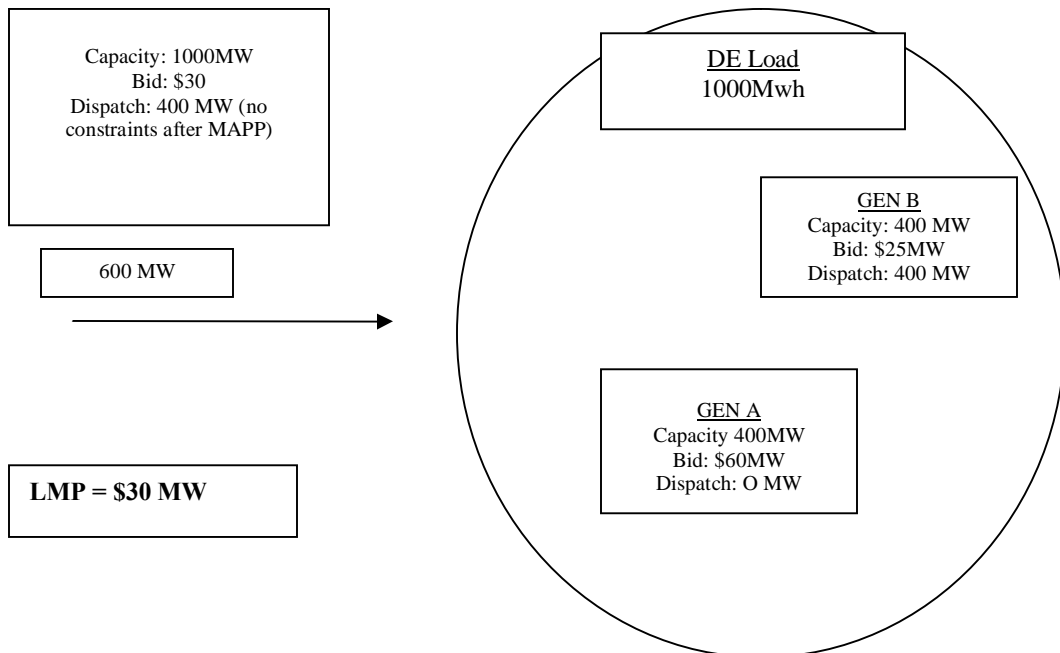
Projects such as MAPP demonstrate that the issue of Delaware customers gaining access to lower cost generation may not be a generation capacity issue, but a transmission constraint issue. (See Diagram below) Customers are already paying for projects such as MAPP in their transmission rates; they should not have to pay for new contracted generation if MAPP is bringing them the same benefit, lower cost electricity.

The diagrams below demonstrate this, along with the scenario of securing a higher cost generation resource, under contract. For example, if GEN A were to be our newly constructed premium priced generation, consumers would be missing out on the benefits of MAPP as well.

BEFORE MAPP



AFTER MAPP



Consumers may be paying a higher contract MW price for *GEN A*, even though MAPP has made adequate supply available, at a lower price.

5.Risk Allocation

The DPA believes that a competitive procurement process, such as that underway in the current SOS bidding process, can allocate risk between shareholders and customers. This, by definition is reflected in price like in most competitive markets. Thus, all the risks associated with an imperfect, *market clearing priced* wholesale market, such as that at PJM, can be captured in price. A long-term fixed retail price minimizes customer exposure to these risks.

However, the risk in this particular procurement for power for Delaware customers does not reside only in price. The term and volume of the proposed RFP create tremendous exposure for Delaware customers. The DPA mentioned earlier in these comments, any risk that translates into costs, will be passed on to consumers. The exposure with executing a long-term power purchase agreement, in excess of the SOS base load, along with Section 1007 of EURCSA, is too great to subject Delaware customers too. Any savings or value from the competitive supply market for customers will be eroded.

C. Conclusions

EURCSA is a two-sided tool available to this Commission to help bring low cost, environmentally friendly electricity to Delaware consumers. Securing a long-term energy contract for SOS supply is only one-side of the tool, (the *ōRFPō*). The other side is the now nascent PSC Docket 07-20, which has an objective to define an Integrated Resource Plan for Delaware's energy future, (the *ōIRPō*).

The four state agency reviews must be careful that the RFP side of the tool is not too heavy handed, given the other initiatives already in play for Delaware customers. Currently, MAPP is underway, as well as recent legislative initiatives such as the Renewable Portfolio Standard for electric suppliers, the Green Energy Fund, and the pending Sustainable Energy Utility legislation.